



**Alexander Van der Bellen**  
**Managing Director Government Affairs**  
**& Associate General Counsel**

December 24, 2008

**Via Electronic Filing**

Ms. Dorothy Beard  
Dockets Operations Facility, M-30  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E.  
Room W12-140, West Building  
Washington, D.C. 20590

Re: Corrections to Reply and Answer of Delta Air Lines, Inc. (Docket DOT-OST-2008-0234)

Dear Ms. Beard:

Delta hereby submits the attached corrected page 16 of its Answer filed on November 26, 2008 and pages 2 and 3 of its Reply filed on November 7, 2008 in this docket.

A copy of this letter has been filed electronically in the docket and is being served on all persons on the attached service list.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'A. Van der Bellen', written in a cursive style.

Alexander Van der Bellen

that competition in the critical New York marketplace is not compromised by improper spillover effects.

Star's contention that Lufthansa's investment stake and management say in JetBlue "does not raise an issue for purposes of the Joint Application" is wishful thinking. Moreover, the assertion that Lufthansa's investment is similar to Northwest's investment in Midwest Airlines is flatly incorrect. The Lufthansa investment relationship with JetBlue differs significantly from Northwest's investment in Midwest Airlines in a number of important ways.

The DOJ typically considers a number of issues when analyzing whether a passive minority investment raises competitive concerns, including: (1) whether the investor will have access to the company's competitively sensitive information, and (2) whether the investor will gain any control rights over the company by virtue of its investment. See, e.g., *United States v. US West*, No. 96 2529, 1997 WL 269482, \*10 (D.D.C. 1997) (complaint alleged that the acquiring company's shareholding would allow it to receive advance notice of significant business transactions); *United States v. CommScope, Inc.*, Civ. No. 1:07-CV-02200 (D.D.C. Jan. 6, 2007) (complaint alleged the acquiring party "will be able to exert substantial control" over a competitor, including through the rights to appoint board members, obtain confidential competitive information, and influence executive compensation). During the DOJ's six month review of Northwest's investment in Midwest Airlines, Northwest presented evidence to the DOJ supporting Northwest's arguments that it would be barred from accessing Midwest's competitively sensitive information and that it would lack any control rights that would enable it to manage the operations of Midwest. Although it did not issue a closing statement explaining the rationales for its decision, DOJ allowed the transaction to proceed.

In contrast to the Northwest/Midwest situation, Lufthansa has seats on JetBlue's board. Lufthansa has appointed two members to JetBlue's board: (a) Stephan Gemkow, who also serves as Lufthansa's own Chief Financial Officer, and (b) Christoph Franz, who is CEO of Lufthansa-owned Swiss International Airlines. These seats give Lufthansa both influence over JetBlue's operations and access to its confidential information. If Lufthansa also receives current distributions from JetBlue by virtue of Lufthansa's equity investment, then every single factor that worked in the favor of Northwest/Midwest cuts against Lufthansa/JetBlue,

Contrary to the Joint Applicants' urging, the Department cannot press forward and rush to judgment on Star's expansion without examining these unique and troubling issues in greater detail.<sup>2</sup> With a global alliance of this scale, and the potential for spillover in domestic markets affecting more than 30 nonstop destinations out of New York, the public interest demands more than the dismissive and inadequate responses of the Joint Applicants.

### **Lufthansa's Investment in JetBlue**

Star's contention that Lufthansa's investment stake and management say in JetBlue "does not raise an issue for purposes of the Joint Application" is wishful thinking. Moreover, the assertion that Lufthansa's investment is any way similar to Northwest's investment in Midwest Airlines is belied by the facts. As explained below, the Lufthansa investment relationship with JetBlue differs significantly from Northwest's investment in Midwest Airlines in several important ways. It is critically important for the Department to understand both these distinctions and the potential for Lufthansa's investment relationship to create domestic spillover effects before moving forward with the consideration of this application.

The DOJ typically considers a number of issues when analyzing whether a passive minority investment raises competitive concerns, including: (1) whether the investor will have access to the company's competitively sensitive information, and (2) whether the investor will gain any control rights over the company by virtue of its investment. See, e.g., *United States v. US West*, No. 96 2529, 1997 WL 269482, \*10 (D.D.C. 1997) (complaint alleged that the acquiring company's shareholding would allow it to receive advance notice of significant business transactions); *United States v.*

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<sup>2</sup> Continental is not currently an immunized member of SkyTeam or any other global alliance. Continental does not need a grant of immunity from the Department to interact with the Star carriers on the same arms-length basis with which Continental participates in SkyTeam today. Given Continental's go-it-alone strategy, which has served its commercial interest for many years, there is no credible urgency to this application.

CommScope, Inc., Civ. No. 1:07-CV-02200 (D.D.C. Jan. 6, 2007) (complaint alleged the acquiring party "will be able to exert substantial control" over a competitor, including through the rights to appoint board members, obtain confidential competitive information, and influence executive compensation). During the DOJ's six-month review of Northwest's investment in Midwest Airlines, Northwest presented evidence to the DOJ supporting Northwest's arguments that it would be barred from accessing Midwest's competitively sensitive information and that it would lack any control rights that would enable it to manage the operations of Midwest. Although it did not issue a closing statement explaining the rationales for its decision, DOJ allowed the transaction to proceed.

In contrast to the Northwest/Midwest situation, Lufthansa has seats on JetBlue's board. These seats give Lufthansa both influence over JetBlue's operations and access to its confidential information. If Lufthansa also receives current distributions from JetBlue by virtue of Lufthansa's equity investment, then every single factor that worked in the favor of Northwest/Midwest cuts against Lufthansa/JetBlue, with respect to Lufthansa's proposed antitrust immunized relationship to Continental. Indeed, Lufthansa's mechanisms of control over JetBlue, coupled with a grant of ATI with Continental, are the kinds of mechanisms that both the DOJ and the courts have deemed anticompetitive in past cases.<sup>3</sup> While the DOT may have conducted a standard Part 204 fitness review of JetBlue following Lufthansa's investment, that review in no way answers the new competitive questions now raised by Lufthansa's proposed relationship ATI with Continental.

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<sup>3</sup> See McTanney v. Stolt Tankers & Terminals, S.A., 678 F. Supp. 118 (E.D. Pa. 1987) (denying a motion to dismiss a Section 7 claim where the defendants controlled the business activities of the acquired company); see also United States v. US West, No. 96 2529, 1997 WL 269482, \*10 (D.D.C. 1997) (complaint alleged that the acquiring company's shareholding would allow it to receive advance notice of significant business transactions); United States v. CommScope, Inc., Civ. No. 1:07-CV-02200 (D.D.C. Jan. 6, 2007) (complaint alleged the acquiring party "will be able to exert substantial control" over a competitor, including through the right to appoint board members, obtain confidential competitive information, and influence executive compensation).

## CERTIFICATE OF SERVICE

The foregoing Letter has been served this 24<sup>th</sup> day of December, 2008, upon the following persons via email:

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